**No. 14749**

IN THE

# United States
# Court of Appeals
## For the Ninth Circuit

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of GENERAL GRANT GREER, JR., *Appellee*.

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of RUBBY GREER, Deceased,

Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLANTS.

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# INDEX


| | Page |
|---|---|
| Appendix | 36-39 |
| Argument | 14-34 |
| No. I | 14-20 |
| No. II | 20-26 |
| No. III | 27-31 |
| No. IV | 31-34 |
| Conclusion | 34-35 |
| Jurisdiction | 2- 3 |
| Preliminary Statement | 2 |
| Specifications of Error | 9-13 |
| Statement of the Case | 3- 9 |

Page

BENTON vs. THOMPSON (Mo.)
156 S.W. 2d 739 ..... 33

BERGER-McNAIR vs.
94 Mont. 441; 15 P. 2d, 834 .....14, 22

BILLAR-KRAUTH vs.
71 Ariz. 298; 226 P. 2d, 1012 .....23, 25

BOWMASTER vs. WILLIAM H. DePREE CO.
258 Mich. 538; 242 N.W. 744 .....14, 16, 18

BURBA-GREENWELL'S ADMINISTRATOR vs.
298 Ky. 255; 182 S.W. 2d, 436 ..... 32

BUTANE CORPORATION vs. KIRBY
66 Ariz. 272; 187 P. 2d, 325, 334 ..... 23

COOPER vs. TETER
123 W. Va. 372; 15 S.E. 2d, 152, 153.....14, 16

COTE-SPANG vs.
68 Atl. 2d, 823 .....24, 29

DENEVAN-PETERSON vs. (C.C.A. 8th)
177 Fed. 2d, 411, 412 ..... 26

DePREE, WILLIAM H-BOWMASTER vs.
258 Mich. 538; 242 N.W. 744 ..... 14, 16, 18

DIETZ vs. MORRIS (Me.)
98 Atl. 2d, 537 ..... 30

EVERETT, City of-MOREHOUSE vs.
141 Wash. 399; 255 P. 157, 160; 58 ALR 1482 ..... 23

FRANCO vs. VAKARES
35 Ariz. 309; 277 P. 812 ..... 33

FRIEDMAN vs. FRIEDMAN
40 Ariz. 96; 9 P. 2d, 1015 ..... 33

GREENWELL'S ADMINISTRATOR vs. BURBA
298 Ky. 255; 182 S.W. 2d, 436 ..... 32

Page

HENRY vs. S. LIEBOVITZ & SONS
312 Pa. 397; 167 Atl. 304, 305 .....14, 15, 16, 18

HOWELL-OKLAHOMA POWER & WATER CO. vs.
207 P. 2d, 937 ..... 14

KASTLER vs. TURES
199 Wisc. 120, 210; N.W. 415, 417 .....14, 15, 16, 18, 22

KIRBY-BUTANE CORPORATION vs.
66 Ariz. 272; 187 P. 2d, 325, 334 ..... 23

KRAUTH vs. BILLAR
71 Ariz. 298; 226 P. 2d, 1012 .....23, 25

LEHNERT-ROBINSON vs.
71 Ariz. 454; 229 P. 2d, 708, 709 ..... 19

LIEBOVITZ, S. & Sons-HENRY vs.
312 Pa. 397; 167 Atl. 304, 305 .....14, 15, 16, 18

LITTON-SMITH vs.
47 Sou. 2d, 411 ..... 22

MOREHOUSE vs. CITY OF EVERETT
141 Wash. 399; 255 P. 157, 160; 58 ALR 1482 ..... 23

MORRIS-DEITZ vs. (Me.)
98 Atl. 2d, 537 ..... 30

MOTORS INSURANCE CORPORATION vs. RHOTON
72 Ariz. 416; 236 P. 2d, 739 .....16, 24, 27

McNAIR vs. BERGER
94 Mont. 441; 15 P. 2d, 834 .....14, 22

OKLAHOMA POWER & WATER CO. vs. HOWELL
207 P. 2d, 937 ..... 14

PETERSON vs. DENEVAN (C.C.A. 8th)
177 Fed. 2d, 411, 412 ..... 26

RHOTON-MOTORS INSURANCE CORPORATION vs.
72 Ariz. 416; 236 P. 2d, 739 .....16, 24, 27

Page

ROBINSON vs. LEHNERT
71 Ariz. 454; 229 P. 2d, 708, 709 ..... 19

ROCCA vs. TILLIA (Pa.)
162 Atl. 495 ..... 32

SPANG vs. COTE
68 Atl. 2d, 823 .....24, 29

SMITH vs. LITTON,
47 Sou. 2d, 411 ..... 22

TETER-COOPER vs.
123 W. Va. 372; 15 S.E. 2d, 152, 153 .....14, 16

THOMPSON-BENTON vs. (Mo.)
156 S.W. 2d, 739 ..... 33

TILLIA-ROCCA vs. (Pa.)
162 Atl. 495 ..... 32

TURES-KASTLER vs.
199 Wisc. 120, 210; N.W. 415, 417 .....14, 15, 16, 18, 22

VAKARES-FRANCO vs.
35 Ariz. 309; 277 P. 812 ..... 33

## ARIZONA STATUTES CITED


Page

Arizona Code Annotated, 1939, Sec. 66-157a,
Laws 1950 (1st S.S.) Ch. 3, Sec. 107 .....20

Full text at Appendix .....36-37

Arizona Code Annotated, 1939, Sec. 66-182a,
Laws 1950 (1st S.S.) Ch. 3, Sec. 152 .....17

Full text at Appendix .....37-39

Arizona Code Annotated, 1939, Sec. 66-171,
Laws 1950 (1st S.S.) Ch. 3, Sec. 107 .....15, 16

Full text at Appendix .....37

Arizona Code Annotated 1939, Sec. 66-185f,
Laws 1950 (1st S.S.) Ch. 3, Sec. 162 .....14


## AUTHORITIES CITED


Restatement of the Law, Torts,
Vol. 11, Sec. 500, page 106 ..... 19

Restatement of the Law, Torts,
Sec. 491, page 1273 ..... 31


## FEDERAL STATUTES CITED


28 U.S.C.A. 1921, C 646, 62 Stat. 929 as amended ..... 3

28 U.S.C.A. 1294, C 646, 62 Stat. 930 as amended ..... 3

28 U.S.C.A. 2107, C 646, 62 Stat. 963 as amended
May 24, 1949 C 139, Secs. 107-108,
63 Stat. 104 ..... 3

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No. 14749

## BRIEF OF APPELLANTS

In this Brief the parties will be referred to by their designations in the District Court, namely, Appellants as Defendants, and Appellees as Plaintiffs.

Reference to the printed Transcript of Record will be indicated by the letter "T" followed by the page number.

## PRELIMINARY STATEMENT

This is a consolidated appeal from two Judgments of the United States District Court for the District of Arizona, rendered by said Court sitting without a Jury, for damages for the death of Plaintiff's Administrator's intestate in each case, which deaths resulted from injuries received in a common accident on a public highway in the State of Arizona, the accident being allegedly caused by the wilful and wanton misconduct and negligence of Defendant J. W. NATION, in the operation of a tow truck owned by Defendant, GRIFFEN BUICK, INC.

## JURISDICTION

Plaintiff, a citizen of the State of California, and the duly appointed and acting Administrator of the Estates of GENERAL GRANT GREER, JR., Deceased, and RUBBY GREER, Deceased, respectively (T 3) (T 7) brought this action in the District Court of the United States for the District of Arizona against the Defendants, GRIFFEN BUICK, INC., an Arizona Corporation (T 3, T 7) and J. W. NATION, a citizen and resident of the State of Arizona (T 3, T 7) seeking to recover damages in the sum of Two Hundred Thousand ($200,000.00) Dollars for the death of GENERAL GRANT GREER, JR., Deceased, and in the sum of One Hundred Thousand ($100,000.00) Dollars for the death of RUBBY GREER, Deceased, resulting from injuries alleged to have been sustained in an automobile accident occurring near Yuma, in the State of Arizona.

Defendants entered their appearance in both actions, preliminary matters were heard and disposed of by the District Court; Defendants' Answers were filed and the cases were set for trial without a jury as consolidated cases (T 17).

Trial of the actions was had, the case was submitted, and on August 24, 1954, the Court's Order for Judgment was made, and duly filed and docketed on August 26, 1954 (T 17-18).

Thereafter, on October 18, 1954, Findings of Fact and Conclusions of Law were made and entered (T 18-21) (T 22-25), and judgments were entered in favor of the Plaintiff in each action (T 26-27) (T 27-28).

On October 19, 1954, Defendants' Objections and Exceptions to Findings of Fact and Conclusions of Law and Judgment were filed (T 28-32) (T 33-36) and Defendants' Motion for New Trial filed on October 26, 1954 (T 37). By minute entry of February 21, 1955, the Motion for New Trial was ordered designated as a Motion to Set Aside Findings of Fact and Conclusions of Law and Judgments, in Civ. 1921 and Civ. 1922, and to Enter Judgments for Defendants, Or In The Alternative For a New Trial. The Motion was denied and Execution of Judgment stayed for a ten-day period (T 38).

The Judgment thereupon became final and appeal therefrom to the Circuit Court of Appeals lies under C 646, 62, Stat. 929 as amended, 28 U.S.C.A. 1921, and C 646 Stat. 930 as amended, 28 U.S.C.A. 1294, the general statutes on appeal, and within the time limit allowed by C 646, 62 Stat. 963 as amended May 24, 1949, C 139, Sections 107, 108, 63 Stat. 104, 28 U.S.C.A. 2107. Notice of Appeal and Statement of Points were filed within the time limit (T 39-40) (T 40-43) and the Court's Order extending time for filing record on appeal, and docketing the appeal to and including April 30, 1955, was entered on April 12, 1955 (T 45).

## STATEMENT OF THE CASE

At some time between December 10th and December 17th, 1952, GENERAL GRANT GREER, JR., and RUBBY GREER, left Richmond, California, to travel to Michigan via Hope, Arkansas (T 117, 120-121, Plaintiff's Exhibit 20 in Evidence at page 13, lines 12-19). They were driving a 1952 Buick bearing 1952 Michigan license plate CR-10-93 (T 123-124) owned by The United Church of Christ in God, Richmond, California (Plaintiff's Exhibit 20 in Evidence at page

11, lines 8-10). Their return trip was apparently over the same route.

On December 23, 1952, seventeen miles east of Yuma, Arizona, on U. S. Highway 80 (T 49), the Buick was involved in a collision with a semi trailer and with Defendant's GMC tow truck (T 49, 51). The GREERS received injuries from which they died (T 63).

On August 13, 1953, Plaintiff filed Complaints in the United States District Court for the District of Arizona, seeking damages of $200,000.00 together with burial expenses for the Estate of GENERAL GRANT GREER, JR., Deceased, and damages of $100,000.00 together with burial expenses for the Estate of RUBBY GREER, Deceased. There was no claim for property damage. The Complaints alleged that the accident was caused by the negligence of Defendant J. W. NATION, in that he negligently, wilfully, recklessly and wantonly placed and operated Defendant GRIFFEN BUICK, INC.'S tow truck on the highway in such a position and location as to imperil the lives of persons traveling on the highway (T 3-9).

Defendants appeared, and after the respective prayers for burial expenses were stricken on Order of the Court (T 11), filed their Answers admitting the tow truck was owned by GRIFFEN BUICK, INC., and that Defendant NATION was operating it within the scope of his employment for GRIFFEN BUICK, INC. The Answers denied and other material allegations of Plaintiff's Complaint and alleged the accident was due to the negligence of GENERAL GRANT GREER, JR. (T 12-16).

By Stipulation, Jury was waived (T 17) and the cases consolidated and set for trial before the Court without a Jury and came on for trial on February 12, 1954.

The accident occurred at 10:15 o'clock P.M. on a clear, dry night; there was no moon (T 70-71, Plaintiff's Exhibit 20 in Evidence, page 22).

The road at the scene of the accident ran generally east and west. For west bound traffic the road was on a 2% upgrade (T 70) and was a slight curve to the northwest, or the driver's right (T 67-68). Three hundred feet east of the scene, a small knoll was located at the north side of the road (T 66).

There was a semi trailer and tractor located at the scene. This equipment faced west, parallel to and 4 feet north of the north edge of the highway (T 54-56, and see rectangle designated "truck" as drawn on Plaintiff's Exhibit 14 in Evidence). Defendant GRIFFEN BUICK, INC.'S tow truck was located 30 feet east of the rear of the trailer (T 97) angled across the north lane of the highway heading southeast and not directly facing west bound traffic (T 98-99). The left rear wheel of the tow truck was off the north edge of the pavement (T 97, Plaintiff's Exhibit 22 in Evidence, pages 24 and 25) and its right front wheel was 3 feet north of the center line (T 99, and see rectangles marked on Plaintiff's Exhibits 13 and 14 in Evidence). A towing cable extended from the tow truck's boom to the back of the trailer (T 95). On the front of the tow truck, the parking lights were burning (T 97) and on the towing boom were located a red light and a white light (T 97, 100-101, Plaintiff's Exhibits 9, 10, 11 and 12 in Evidence). These boom lights faced the rear and shone on the rear end of the semi trailer (T 134-135). Every light on the tractor and trailer was lighted (T 96, 84-85, and the Plaintiff's Exhibit 1 in Evidence, with rear lights circled).

The lights of these two vehicles would be visible to an approaching west bound driver when he was ¾ of a mile east of the scene and continuously until he reached a point ¼ of a mile from the scene of the accident. From ¼ of a mile to 450 feet from the scene, the driver's view of the semi and tow truck would be obstructed in varying degrees, depending on the distance the car was from the knoll located at the north shoulder. From 450 feet on to the scene of the accident, the driver would have a clear and completely unobstructed view of the tow truck and semi tractor and trailer (T 83-85).

Three hundred feet east of the scene (T 90) and at the point of the knoll (T 66), Defendant NATION placed a red magnesium fusee at the north edge of the highway (T 90-91, 81-82, and see marking designated "flare" on Plaintiff's Exhibits 15, 16 and 18 in Evidence). These fusees are visible for 1½ to 2 miles (T 85) and a west bound car would have a clear view of this particular fusee for ¾ of a mile before reaching the fusee (T 85). This particular fusee was burning immediately prior to the accident (T 137). Defendant NATION also placed a double red glass reflector opposite the fusee and in the approximate center of the north or west bound lane of traffic (T 92). This reflector was visible and in place immediately prior to the time of the accident (T 137).

While the vehicles were in this position and prior to the approach of Decedents' Buick, several west bound cars passed the tow truck and semi trailer, all slowing down and passing on the left hand or south side of the highway (T 137).

Defendant NATION was in the cab of the tow truck when he heard and saw the Buick approaching ¾ of a mile east of the truck (T 95-96). When it was ½ mile distant, Defendant NATION formed the opinion that the Buick was traveling at a speed of around 100 miles per hour (T 102) based on his experience in testing automobiles at high speeds and the time in which the Buick traveled the distance involved (T 135-136).

From this moment on, Defendant NATION could not and did not attempt to move his tow truck for the reason that his winch motor was in operation (T 136). This motor worked off the truck transmission. While it could be disengaged by pushing in on the clutch of the truck, letting the clutch out would engage it again. To drive the truck off the highway, NATION had to get out of the cab, go to the rear of the truck, move one lever up to release the clutch, work a second lever in or out and then return to the cab and put the truck in gear (T 141). If an attempt were made to move the truck without taking the winch motor off the transmission by means of the

levers at the rear of the truck, the gears would lock and lock the rear wheels of the truck (T 142).

At this point NATION began blinking his lights from parking beam to driving beam (T 102). The Buick did not alter its speed or direction at any time up to the moment of the collision (T 101-102). The Buick left no skid marks (T 63). Its tire marks first left the pavement on the north side of the highway when the Buick was 44 feet east of the rear of the trailer (T 99) or about 20 feet east of the tow truck (T 81). When 35 feet east of the trailer, the Buick ran over one of the series of highway reflectors designating the north edge of the pavement on the curve (T 69, 82) (reflector identical to reflector pictured on Plaintiff's Exhibit 18 in Evidence). The Buick then traveled on to strike the left front bumper and sideswipe the left side of the tow truck (T 71-72), and ran on under the rear end of the trailer (T 49). The force of the impact tore the towing boom on the tow truck loose (T 73). It moved the partially loaded tractor and trailer, which was sitting in 8 inches of loose blow sand, (T 72), 2 feet to the west (T 73), sheared five ¾ inch rivets off of the undercarriage on one side of the trailer (T 75 and Defendants' Exhibit A in Evidence), sheared rivets off the undercarriage on the other side of the trailer (Defendants' Exhibit B in Evidence) and knocked the undercarriage loose from the trailer (T 75). The force of the impact also shoved the radiator of the Buick back to its windshield (Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8 in Evidence).

Several cars stopped after the accident. One driver volunteered the comment that the Buick was the same automobile that had passed him down the road and while he was driving 70 miles per hour the Buick passed him like he was standing still (T 139 and Plaintiff's Exhibit 20 in Evidence, page 10, line 19, page 11, line 7).

On direct examination Plaintiff LONDON EVANS first testified that the GREERS had left California enroute to Detroit, Michigan, on December 10, 1952. On cross examination

he admitted that three days after the accident he testified at the inquest at Yuma, Arizona, and that his testimony was to the effect that the GREERS were returning from Detroit and that "I could not definitely tell the date. I think they left the State of California to Detroit the 16th or 17th of December" (T 120-121 and Plaintiff's Exhibit 20 in Evidence, page 13, lines 12 through 19). Plaintiff LONDON EVANS also testified that he held a conversation with Patrolman Cochran following the inquest, at which time he told the Patrolman that while he did not know exactly when decedents left California to go to Detroit, he "did not think it had been over a week" (T 121). This was corroborated by the Patrolman (T 124). The Patrolman also testified that the distance from Benson, Arizona, to the scene of the accident was 275 miles (T 125).

W. T. Mendenhall, Arizona State Entomologist, testified, from the records of the Department's checking station at Benson, Arizona, that a Buick automobile bearing Michigan license CR-10-93 passed through that station between 4:25 and 4:30 P.M. on December 23, 1952 (T 127-131) only 5¾ hours prior to the accident which occurred about 10:15 P.M. of the same date (Plaintiff's Exhibit 20 in Evidence, at page 22), the Buick was apparently averaging a speed of 47.65 miles per hour, mostly after dark, between those two points (T 145).

Although not in the record, we believe the Court can properly take judicial notice of the fact that the most direct paved route from Benson, Arizona, to the scene of the accident passes through Tucson, Picacho, Eloy, Casa Grande and Gila Bend, Arizona, and this route is a State highway, and that the legal speed on a State highway in Arizona is "fifty (50) miles per hour during the nighttime on State highways". (Section 66-157a, par. 4 (b) Arizona Code Annotated, 1939, as amended by Laws 1952 (1st S.S. Ch. 3 of Sec. 56). (for full text see Appendix).

Defendants' Motion for Judgment at the close of Plaintiff's case having been denied (T 122-123), the case was submitted

(T 146). Thereafter the Court entered Findings of Fact and Conclusions of Law and Judgment in favor of Plaintiff in Civil 1921 in the sum of $10,000.00, and in Civil 1922 in the sum of $15,000.00 (T 18, 22, 17), over Objections and Exceptions thereto filed by Defendants (T 28, 33).

Defendants' Motion for New Trial, designated by minute entry (T 38) as a Motion to Set Aside Findings of Fact, Conclusions of Law, Judgment, and to Enter Judgment for Defendants, was duly filed (T 37) and denied (T 38).

## SPECIFICATIONS OF ERROR

### I.

The Court erred in finding that the motor vehicle in which Plaintiff's Intestates were riding, was being operated in a careful and prudent manner and with due regard for the safety of others on the highway, on the ground and for the reason that there is no evidence that said motor vehicle was being operated in a careful and prudent manner and with due regard for the safety of others on the highway; and for the further reason that all the evidence shows that said vehicle was being operated in a grossly wilful, wanton and negligent manner with deliberate disregard for the safety of others using the highway under the conditions then and there existing.

### II.

The Court erred in finding that Defendant-Appellant J. W. NATION, wantonly and wilfully placed said tow car, and caused said tow car to be placed on said highway in such a position and location as to imperil the lives and property of persons traviling in motor vehicles on said highway, on the ground and for the reason that there is no evidence that such placement of the tow car on the highway imperiled the lives and property of persons properly using the highway under the conditions then and there existing.

III.

The Court erred in finding that Defendant-Appellant J. W. NATION, wilfully and wantonly failed and neglected to give and place suitable warnings of the position and location of said tow car, on the ground and for the reason that there was no evidence that Defendant NATION failed to give and place suitable warnings, and on the further ground that all the evidence was that adequate and suitable warnings were given and placed by Defendant NATION.

IV.

The Court erred in finding that said Defendant NATION recklessly and negligently operated, maintained and controlled said tow car, on the ground and for the reason that Defendant J. W. NATION'S only duty was to exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances and all the evidence is that he fulfilled that duty.

V.

The Court erred in finding that the collision and the injuries and death of Plaintiff's Intestates directly and proximately resulted from wilful and wanton misconduct and from recklessness and negligence of Defendent, J. W. NATION, on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VI.

The Court erred in finding that the Estates of Plaintiff's Intestates were diminished, depleted and damaged in any sum whatsoever as a direct and proximate result of "said wilful and wanton misconduct, and of said recklessness and negligence on the part of Defendant NATION" on the ground and for the

reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION, and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VII.

The Court erred in finding that the sole, proximate cause of said collision and of the deaths of Plaintiff's Intestates, and of the damage to the estates thereof, was the "said wilful and wanton misconduct and said recklessness and negligence of said Defendant NATION" on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VIII.

The Court erred in finding that at the time and place of said accident, the Plaintiff's Intestate was not guilty of any negligence or want of care which contributed as a proximate cause of said collision or of said deaths or of said damages, on the ground and for the reason that there is no evidence that the driver of the Buick exercised due or any care, and on the further ground that the sole, uncontroverted evidence was that the operator of the Buick was negligent.

IX.

The Court erred in making the conclusion of law that the Plaintiffs were entitled to any judgment whatsoever against the Defendants, GRIFFEN BUICK, INC., and J. W. NATION, jointly and severally in either Civ. 1921 Phoenix, or Civ. 1922 Phoenix, on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC., and on the further

ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

X.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of contributory negligence, on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent.

XI.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of negligence on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent.

XII.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of gross, wilful and wanton negligence on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent, and that his conduct was such that he knew or had reason to know that his conduct created an unreasonable risk of, and involved a high degree of probability that, substantial harm would result to himself and others.

XIII.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was negligent and that such negligence was imputed to RUBBY GREER on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick was wilfully, wantonly and grossly negligent and that such negligence was so extreme as to require some action by RUBBY GREER in the interests of her own welfare, and on the further ground that GENERAL GRANT GREER, JR. and RUBBY GREER were engaged in a joint venture.

XIV.

The Court erred in failing to find that Defendant-Appellant J. W. NATION, and therefore Defendant-Appellant GRIFFEN BUICK, INC., was not guilty of any negligence on the ground and for the reason that Defendant GRIFFEN BUICK, INC. could not be guilty of negligence if its employee, Defendant J. W. NATION was not negligent.

XV.

The Court erred in denying Defendants' Motion for Judgment for Defendants on the ground and for the reason that there was no evidence of negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC., and on the further ground that the evidence shows that the operator of the Buick was solely negligent.

XVI.

The Court erred in denying Defendants' Motion to Set Aside Findings of Fact and Conclusions of Law, Judgment and to enter Judgment for Defendants, or in the alternative for a New Trial, on the ground and for the reason that there was no evidence of negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC. and on the further ground that the evidence shows that the operator of the Buick was solely negligent.

XVII.

The Findings of Fact, Conclusions of Law and Judgments are not justified by the evidence and are contrary to the evidence and to the law in both Civ. 1921 and Civ. 1922 Phoenix on the ground and for the reason that there is no evidence of negligence on the part of Defendant J. W. NATION, and that the evidence shows that the operator of the Buick was solely negligent, and on the further ground that there is no evidence to show that the conduct of Defendants, J. W. NATION or GRIFFEN BUICK, INC. caused or in any way contributed to the accident and to the deaths complained of.

## ARGUMENT

### I.

This Argument is urged in support of Specifications of error Nos. II, III, IV, V, VI, VII, IX, XIV, XV, XVI, XVII.

The negligence of Defendant, J. W. NATION, and consequently the derivative negligence of Defendant GRIFFEN BUICK, INC., must be determined either under the statute or the common law.

There are no statutory restrictions upon the operation of tow cars in the State of Arizona, except for Section 66-185f, Arizona Code Annotated, 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 162, entitled "Trailers and towed vehicles". This Section deals with moving tows and has no applicability here.

The Arizona Supreme Court has not dealt with questions of law involving towing operations.

The general rule is that a wrecker blocking or partially blocking the highway in an effort to extricate a disabled vehicle, is making a necessary and proper use of the highway.

*KASTLER* vs. *TURES*,
199 Wisc. 120, 210; NW 415, 417.

*HENRY* vs. *S. LIEBOVITU & SONS*,
312 Pa. 397; 167 Atl. 304, 305.

*McNAIR* vs. *BERGER*,
94 Mont. 441; 15 P. (2d) 834.

*BOWMASTER* vs. *WILLIAM H. DePREE CO.*
258 Mich. 538; 242 NW 744.

*COOPER vs. TETER*,
123 W. Va. 372; 15 SE (2d) 152, 152.

*OKLAHOMA POWER N WATER CO.* vs. *HOWELL*
201 Okla. 615; 207 P. (2d) 937.

The question then arises as to whether any of the general statutes applicable to the use of the highway are here involved. Plaintiff has urged that Section 66-171 Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 107 entitled "Stopping, standing or parking outside of business or residence district" (see Appendix, page 37 for full context) was violated by Defendant NATION and that such violation constituted negligence.

It has been held that substantially similar statutes had no applicability to a tow car's operation, deeming such operation a use of the highway in an emergency. The Wisconsin Supreme Court in *Kastler* vs. *Tures* (supra), under a similar fact situation, held that the statute applied only to a voluntary act of leaving a car upon the highway when not in use, and stating "this was not such a case. Here there had been an accident. The wrecked car was in the ditch with passengers in it, and the Plaintiff was making a proper and necessary use of the highway under an emergency." In that case, the Plaintiff was the tow truck operator.

The Pennsylvania Supreme Court also construed such a stopping statute in *Henry* vs. *S. Liebovitz & Sons* (supra). The material difference between the Pennsylvania and Arizona statutes was that the Pennsylvania statute required at least 15 feet of the highway to be left unobstructed for the passage of other vehicles, while the Arizona statute specifies only "an unobstructed width of the highway" should be left for the free passage of other vehicles. The *Liebovitz* case involved another towing mission,—to remove a car from the ditch. The paved highway was 18 feet wide and the evidence was in dispute as to whether the tow car obstructed 15½ or 11½ feet of the pavement. The Court there held that such use of the tow car was a lawful use, stating: "If, now, that operation——required the temporary use of more than half the highway during the forward movement, it cannot be said that such operation was within the prohibition——" of the statute.

The Arizona Supreme Court has construed the Arizona statute generally in *Motors Insurance Corporation* vs. *Rhoton*, 72 Ariz. 416; 326 P. (2d) 739, holding there that parking a car on the highway in derogation of the statute was not in itself actionable negligence and could only be so if it were proved that such action was the proximate or contributing cause of the accident. This case did not involve towing operations.

The use made of the highway by Defendant NATION in attempting to tow the semi back on to the highway would not be subject to Section 66-171 Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 107. It is doubly apparent that no negligence of Defendant NATION could be predicated on this statute in view of the express intent of Section (a). It was not only impracticable but impossible for NATION to perform his towing from any position except the position he occupied upon the highway. It being necessary for him to be upon the highway, he was there strictly within the limitations of the statute. An unobstructed width of the highway opposite the tow truck was left for the free passage of other vehicles. This unobstructed portion was 22½ feet of the 30 foot highway (T 64). There was also a clear view of the tow truck and semi for 300 feet to the east. This was in excess of the statutory 200 feet requirement.

Defendants do not contend that NATION had no duties merely because he was operating a towing vehicle. He had a duty to warn travelers on the highway of the presence of the tow truck and semi. This duty would be a common law duty measured by whether or not Defendant NATION used the same care as a reasonably prudent man would use under the same or similar circumstances unless there was some statutory definition of the necessary warnings.

*Cooper* vs. *Teter* (supra) at page 155.
*Bowmaster* vs. *William H. DePree Co.* (supra) at page 745.
*Kastler* vs. *Tures* (supra) at page 417.
*Henry* vs. *S. Liebovitz & Sons* (supra) at page 305.

Section 66-182a Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 152, entitled "Display of warning devices when vehicle disabled". (see Appendix, page 37 for full text) is inapplicable to the facts here involved. Defendants' tow truck was not "disabled" within the apparent meaning of the statute. This designation becomes immaterial, however, in view of the positive action taken by Defendant NATION to warn the Plaintiffs and others using the highway in the presence of the tow truck and the semi.

Defendant J. W. NATION placed red magnesium fusees not 100 feet away from the tow truck, but 300 feet in each direction from the location of those vehicles (T 90). The eastern fusee was placed at the point of the knoll (T 66) and was visible to approaching west bound vehicles while they were still one-half to three-fourths of a mile east of the location of that fusee (T 85). In addition, Defendant NATION placed a double red reflector on the highway, in the west bound lane of traffic, at a point also 300 feet in either direction from the stopped vehicles (T 92). The statute permits the use of these portable reflectors in lieu of electric lanterns and lighted flares. The wrecker's red boom light and white boom light were shining on the back end of the semi trailer (T 134-135) and provided the largest possible lighted warning signal that could be given. Additionally, the read end and running lights of the semi trailer were burning (T 96, 84-85, and Plaintiff's Exhibit 22 in Evidence, at pages 29-30).

This combination of warnings far exceeded the requirements of the statute and under the circumstances then present gave warning to approaching motorists at a distance many times that at which that the statute attempted to assure such notice would be given.

Defendant NATION gave one additional warning, he utilized the only other means at his disposal to warn the operator of the approaching Buick, by flicking his lights back and forth from parking beam to driving beam (T 102).

In the case of *Bowmaster* vs. *William H. DePree Co.* the defendant was blocking the highway in an attempt to pull a disabled automobile from the ditch. The time was 10 o'clock at night. The defendant's vehicle stood upon the wrong side of the highway directly facing approaching traffic in that lane, and he turned the bright lights from the front of his truck on full to warn approaching vehicles. The Court there held that such a warning was adequate.

In the case of *Kastler* vs. *Tures,* (supra) a tow truck blocked the south bound lane of traffic of the highway in pulling a car from the ditch on that side. The car had its front and rear lights burning; the service truck had its front lights burning, also a dash light in the truck, a red tail light, and a spot light on the truck's derrick situated at the rear of the truck shining on the car in the ditch. Fifty feet north of these vehicles, stood a man with a flashlight to warn approaching south bound traffic. It was raining at the time. There the Wisconsin Supreme Court did not condemn these warnings as inadequate, even though no flares were placed along the highway.

In the case of *Henry* vs. *S. Liebovitz* & *Sons* (supra) a west bound tow truck was moving diagonally across the east-west highway in towing a disabled automobile from the north side of the highway on to the highway. The truck occupied almost all of the highway. This occurred between 10 and 11 o'clock on a dark, cloudy night. The only lights lighted were the truck's two headlights and two green lights on the top of the truck. When an east bound car approached, the truck driver "rushed forward and attempted to warn the approaching car by waving a flashlight and by passing his hand across the headlight of the truck. The warnings were ineffective." Even these meager warnings were not questioned by the Court.

If the warnings set forth in the cases of *Bowmaster* vs. *William H. DePree Co.* (supra), *Kastler vs. Tures* (supra), and *Henry* vs. *S. Liebovitz* & *Sons* (supra), could be construed to be adequate warnings and such as the ordinarily prudent man

would give under the same or similar circumstances, then there can be no question but that the extensive warnings given by Defendant NATION would not only satisfy the Arizona statute, but would clearly and as a matter of law fulfill the common law duty imposed upon NATION to adequately warn travelers on the highway of the presence of the vehicles.

The question of the adequacy of the warnings is further demonstrated by the testimony that several west bound cars slowed and safely passed the tow truck and semi while they were in the identical position, just prior to the approach of the Buick (T 137).

There can be no negligence ascribed to Defendant NATION'S failure to move the tow truck from the highway after he made his determination that the Buick was traveling at a high rate of speed (T 136). The only evidence in the record is that it was a physical impossibility for NATION to get out of the cab, go to the rear of the tow truck, perform the operations necessary to take the winch motor out of gear, return to the cab and move the tow truck before the Buick arrived at the location of the tow truck (T 141). NATION estimated this time interval as 15 to 20 seconds (T 105). At a speed of 100 miles per hour, or 146.6 feet per second, the Buick would travel 2932 feet, over half a mile, in 20 seconds' time.

In the case of Robinson vs. Lehnert, 71 Ariz, 454, 229 P. (2d) 708, 709, the Arizona Supreme Court defined wilful and wanton negligence, saying:

> "Wanton and wilful negligence is defined in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P. 2d 816, 819, wherein we cited Restatement of the Law, Torts, Vol. II, Sec. 500, p. 106: 'The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.' "

It is clear that NATION'S conduct does not fall within this definition.

There is no question of fact involved in this appeal. The evidence is undisputed. There is no evidence of any act of negligence by Defendant NATION, Plaintiff having entirely failed in his burden of proof in this regard. It is axiomatic that if Defendant NATION was not negligent, his employer GRIFFEN BUICK, INC., could not be liable in any respect whatsoever.

## II.

This Argument is urged in support of Specifications of Error Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

The transcript of record does not reveal any direct evidence as to who was driving the Buick automobile. The only such evidence appears in Plaintiff's Exhibit 20 in Evidence at pages 3-6, where Patrolman Cochran refers to GENERAL GRANT GREER, JR., as the driver without stating the basis for his assumption.

The driver of the Buick, whoever it may have been, had clearly defined statutory duties under Section 66-157a Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 56 (see Appendix page 36 for full text).

The driver of the Buick violated the statute in at least three different respects.

Paragraph (a) was violated. The Buick, according to the only evidence, traveled at a speed of over 70 miles per hour (T 139) and at a speed of 100 miles per hour (T 102). It was nighttime, there was a slight curve in the road (T 67-68), a 2% upgrade (T 70), and a knoll that temporarily obstructed the driver's view (T 84). There was a fusee visible for three-fourths of a mile before the Buick reached it (T 85). there was a clear view of the tow truck and semi for 300 feet before the Buick reached those vehicles (T 83-85). The operation of the

Buick at such high speeds was not reasonable and prudent with regard to "actual and potential hazards then existing." It is obvious that the speed of the Buick was not so controlled as was necessary for it to avoid colliding with the tow truck and semi which were making proper use of the highway.

Paragraph (b) was violated. The Buick exceeded the 50 mile per hour speed limitation for travel on State highways during nighttime. It traveled 275 miles from Benson, Arizona, through Tucson, Picacho, Eloy, Casa Grands and Gila Bend, Arizona, to the scene of the accident in 5¾ hours (T 125, 127-131, Plaintiff's Exhibit 20 in Evidence, page 22, beginning at 4:30 p.m. This occurred in December and at least 4¾ hrs. thereof would necessarily be nighttime travel. About 2 miles before reaching the scene of the accident, the Buick was traveling well over 70 miles per hour (T 139) and immediately prior to the collision it was traveling at approximately 100 miles per hour (T 102). Under the statute, this is prima facie evidence that the Buick's speed was not reasonable or prudent and was unlawful. The burden then shifted to the Plaintiff to prove that such speed was reasonable, prudent and lawful. No evidence tending to even raise such an inference was introduced.

Paragraph (c) was violated. The driver was approaching and upon a curve (T 67-68), approaching a hill crest (T 70), and traveling on a winding road (T 85). This occurred at nighttime (Plaintiff's Exhibit 20 in Evidence, page 22). The driver did not reduce the Buick's speed (T 101-102).

Under the positive direction of the statute, the evidence shows that prima facie the speed and operation of the Buick was unreasonable, imprudent, unlawful and therefore negligent. No evidence was introduced to rebut this negligence.

It is the general rule that where there are no flares placed along the highway to warn approaching vehicles that the highway is blocked or partially blocked by other vehicles, it is a question of fact whether or not the driver of the approaching vehicle is negligent in failing to see such stopped vehicles in sufficient time to avoid colliding with them.

*McNAIR* vs. *BERGER*,
94 Mont. 441; 15 P. (2d) 834.

*KASTLER* vs. *TURES*,
199 Wisc. 120, 210; NW 415, 417.

*SMITH vs. LITTON*,
47 Sou. (2d) 441.

The question is determined by the test of whether a reasonably prudent man would have seen such obstructions in time to avoid colliding with them under the same or similar circumstances.

In *McNair* vs. *Berger* (supra), the only lights present in that instance were on the wrecker and there were no other warnings.

In *Kastler* vs. *Tures* (supra), the headlights of the tow truck were focused on the automobile it was attempting to pull out of the ditch. No warning flares were placed on the highway. A man stood a short distance down the road from the tow car and attempted to warn the plaintiff's approaching automobile. There plaintiff claimed that he was attempting to drive to the right of the truck headlights when the accident occurred. The Court in that instance found that the tow truck operator was negligent in failing to place flares to warn approaching traffic and also held that the driver of plaintiff's automobile was negligent in approaching at a high rate of speed, in not stopping before colliding with the disabled vehicle which "was visible under the Litton (tow truck) headlights, and in failing to observe (or disregarding) the warning of the man who was on the road endeavoring to warn plaintiff's driver of the imminent danger.

The Arizona Supreme Court in cases where the obstruction on the highway was unlighted, has also held it to be a question of fact as to whether the approaching driver was negligent in failing to see the object on the highway.

In the case of *Krauth* vs. *Billar*, 71 Ariz. 298; 226 P. (2d) 1012, an unlighted car, out of gas, was being pushed southward by five teenagers at night. The Billar automobile was traveling south on the same highway and the driver was allegedly blinded by the lights of an approaching north bound automobile. The Court there said:

> "We believe the just test to be: What would an ordinarily prudent person have done under the circumstances as they then appeared to exist."

The Court further said:

> "Here the Appellee BILLAR, claims to have been blinded by the headlights from the 'jeep' which was stopped beside the Ford car. Under such circumstances it became his duty to stop. In the Alabam Freight Lines case, supra, we quoted with approval, the following, from Coe vs. Hough, 42 Ariz, 293; 25 P. (2d) 547, 550: '———If an autoist cannot see where he is going, he should stop. If his vision is limited, he should have such control of his car as to be able to stop within the range of his vision. If he violates these reasonable and sane rules and runs into someone who is at the time exercising reasonable care, he is, we think, guilty of legal negligence.
>
> In analyzing the cases used in determining the proper test, the Court there also quoted at length from the Supreme Court of Washington, in the case of *Morehouse* vs. *City of Everett*, 141 Wash. 399; 255 P. 157, 160; 58 ALR 1482, from which we quote '———we believe, generally speaking, where the statutes or the decisions of the Court require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights.' "

Again in *Butane Corporation* vs. *Kirby* 66 Ariz. 272; 187 P. (2d) 325, 334, the facts were generally similar to those in the *Krauth* vs. *Billar* (supra) case. The Arizona Court there stated:

"The driver of an automobile at night is guilty of negligence if he collides with an object which he has failed to see, and which an ordinarily prudent driver under like circumtsances would have seen. He was guilty of negligence———in the event that a reasonably prudent person would have observed the truck and trailer regardless of the fact that it was without lights."

When the driver of an approaching car has a clear and unobstructed view of the potential hazard, the Arizona Supreme Court has stated a different rule. In *Motors Insurance Corporation* vs. *Rhoton*, 72 Ariz. 416; 236 P. (2d) 739, the approaching driver was traveling in second gear, driving upon slippery roads as he came to the top of the slight hill which was 100 feet from cars parked so that they partially extended on the right side of the highway. The testimony was that the approaching Rhoton car was traveling 20 to 25 miles per hour. The Court criticized counter-claimant Rhoton, saying:

"The physical facts demonstrate that Mr. Rhoton must have been driving his car at a high rate of speed and without due regard to the traffic, surface and width of the highway and other conditions then existing. After he saw the Webb car or could have seen it, he traveled a distance of approximately 400 feet. After passing the crest of the hill and before crashing into the Webb car, he traveled a distance of approximately 100 feet. In crashing into the rear of the Webb car with such terrific force that he bashed in its rear, caused the front of it to be bashed in when colliding with the Clark car, caused the Clark car to be bashed in and then skidded a distance of 147 feet across the highway through and arroyo and up against 10 foot embankment where it came to rest, conclusively demonstrates that the accident was due to the sole, gross and wanton negligence of counter claimants as defined in Alabam Freight Lines vs. Phoenix Bakery, 64 Ariz. 101, 106; 166 P. (2d) 816; Butane Corporation vs. Kirby, 66 Ariz. 272; 187 P. (2d) 325."

Even unlighted obstructions upon the highway do not relieve a driver from watching the road ahead. In the case of *Spang* vs. *Cote*, 68 Atl. (2d) 823, where the approaching driver

collided with an unlighted load of hay, the Court said that the driver was bound to use his eyes and to seasonably see that which is open and apparent.

The case before this Court does not involve unlighted objects on the road, nor even a situation where there are meager lights on the tow truck and semi. It involves a situation where the warnings given were in excess of the statutory requirements and every conceivable and possible warning was used and in operation.

Although the Arizona Supreme Court has not specifically ruled upon the point, the only logical inference from that part of the decision in the case of *Krauth* vs. *Billar,* which we have quoted above, is that when red lights as warnings of danger are required and they are present, that under such a situation the failure of an approaching driver to heed the warnings and see the well lighted obstructions would, as a matter of law, constitute legal negligence on the part of that approaching driver.

The Buick driver had a clear view of the red fusee while traveling for a distance of ¾ of a mile to the fusee's position. The lights of the tow truck and semi were visible to that driver from a distance of ¾ of a mile (T 83-85). They would necessarily appear to be to the west of the red fusee. From a point alongside of the fusee, the Buick driver had a clear view of the stopped equipment for 300 feet (T 83-85). This equipment was brilliantly lighted by all of the semi's lights, the tow truck's parking lights, and the back end of the semi trailer was lighted by the red and white boom lights (T 96-97 and T 100), the lights on the wrecker were blinking from parking beam to driving beam (T 101). All of these warnings were out of the ordinary. A red fusee alongside the road means but one thing, potential danger ahead. A red reflector in the middle of a traffic lane means danger ahead in that lane. Blinking headlights are indicative that an abnormal situation exists and a maze of lights, red and white, centered at one

place along the highway also indicates the presence of an abnormal traffic condition.

All of these warnings were visible to the Buick driver (T 83-85). All of these warnings would be visible to and be seen by any west bound driver that was watching the road ahead. All of these warnings were seen and heeded by those west bound cars immediately ahead of the Buick which slowed and safely passed to the south of the tow truck and semi (T 137).

Despite these multiple warnings, the time of night and the character of the road, the Buick driver did not reduce his speed but continued to operate the Buick at an extreme speed up to the point where it ran into the tow truck and trailer and caused tremendous damage. There is no evidence of excuse or reason for the conduct of the driver of the Buick. This conduct was wilful and wanton in that the driver knew, or had reason to know, that travel at such speed and in such a manner under the circumstances present involved at very least a high degree of probability that substantial harm would result.

In the case of *Peterson* vs. *Denevan*, 177 Fed. (2d) 411, 412 (CCA 8th) the Court said:

> "The question of negligence of whatever degree or description is ordinarily one of fact to be determined by the jury in all cases tried to a jury, and by the Court in cases tried to the Court without a jury. It becomes a question of law only when the facts are undisputed, or if in dispute, are of such potency that all reasonable men must reach the same conclusion."

Defendants submit that in the case before the Court the question of negligence of the driver of the Buick is a question of law. The facts are undisputed. They are of such potency that all reasonable men must reach the same conclusion and that conclusion is that the sole and proximate cause of the collision, injuries and deaths was the wilful and wanton negligence of the driver of the Buick.

## III.

This Argument is urged in support of Specification Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

Defendants do not abandon their Arguments I and II by advancing this Argument. This Argument is presented upon the alternative theory that assuming GENERAL GRANT GREER, JR. was driving the Buick automobile, he was, as a matter of law, guilty of contributory negligence.

This case was tried before the Court without a Jury. The evidence was undisputed except for the date upon which the GREERS left California (T 120-121) and here the evidence is so strong that the only conclusion to which it can lead is that they left California enroute to Detroit not more than a week prior to the date of the accident. The testimony of Plaintiff LONDON EVANS at the inquest (Plaintiff's Exhibit 20 in Evidence, page 13, lines 12 through 19) and his conversation with the Patrolman after the inquest (T 121 and 124) would unquestionably be Plaintiff LONDON EVANS' best recollection. With this undisputed state of the evidence, the District Court's Findings of Fact, Conclusions of Law and Judgments, would have to result from inferences and conclusions. The Circuit Court has the same undisputed evidence before it in the transcript of record. The District Court was in no better position than the Circuit Court of Appeals now is to view this evidence. There is no question involved of usurping the power of the jury on the question of contributory negligence.

In the matter of *Motors Insurance Corp.* vs. *Rhoton,* 72 Ariz; 236 P. (2d) 739, the Appellant, Plaintiff below, was driving eastward on a main highway in Arizona. The road was covered in places with patches of snow and ice. The plaintiff stopped her car just off the paved surface of the highway, being afraid to continue on the road ahead. 100 feet behind her car there was a rise in the road and the road between the rise and the car was icy. After she stopped, a Mr. Webb's car came over

the rise, began to skid, and was finally brought under control and to a stop just behind her car and the right rear fender of her car was slightly dented by the left front fender of the Webb car. The Webb car was approximately 2½ feet onto the highway.

The drivers were outside their automobiles talking when the Appellee, who was counter-claimant in the lower Court, drove his car over the rise, striking the rear end of the Webb car. In the words of the Court:

> "The force of the collision drove the front end of the Webb car into the rear end of the Clark car smashing and denting in the fender, trunk and bumper. Neither of the parties (Webb and Clark) knew what hit them but they found themselves on the ground and knocked several feet farther away from their cars. One of Mrs. Clark's shoes was thrown a distance of 50 feet. The Rhoton car (counter-claimants) skidded across the highway in a northeasterly direction, traveled 147 feet over a pile of limbs and debris and through an arroyo and up against a steep embankment, the top of which was some 8 or 10 feet above the bottom of the arroyo. When the Rhoton car came to rest, its front end was upon the bank with its rear end in the arroyo. The damage to the Rhoton car was so extensive it cost $425.37 to have it repaired. The damage to the Webb car was in the sum of $507.81."

The Court then continued to describe the evidence, saying:

> "That the Webb and Clark cars at the time they were parked could have been seen from a distance of more than 400 feet by Mr. Rhoton as he approached; that the highway in this particular area was straight; that at the time that Mr. Rhoton was approximately 400 feet away from the Webb and Clark cars he was traveling slightly uphill; that the crest of the rise was approximately 300 feet in front of him; and that after crossing over the crest he had approximately 100 feet to travel before reaching the Webb car. It was on this down portion, the last 100 feet, that he encountered ice and snow. Rhoton testified that before and after he crossed over the rise in the highway he was traveling in second gear "just moseying up the hill; just poking

in second gear". Both Mr. and Mrs. Rhoton testified that they did not see the Webb and Clark cars before reaching the crest of the rise and that as they approached the crest it was not possible to see anything ahead except the road. This statement is refuted by the photographs in evidence."

The Arizona Court held that the mere fact that the Webb car might have protruded on to the highway a distance of 3 or 4 feet, did not in and of itself constitute an act of actionable negligence. The Court also held that in its view of the evidence, the protrusion of the Webb car on to the highway could in no manner have been an efficient or contributing cause to the accident.

"The physical facts demonstrate that Mr. Rhoton must have been driving his car at a high rate of speed and without due regard to the traffic, surface and width of the highway and other conditions then existing. After he saw the Webb car or could have seen it, he traveled a distance of approximately 400 feet. After passing the crest of the hill and before crashing into the Webb car, he traveled a distance of approximately 100 feet. In crashing into the rear of the Webb car with such terrific force that he bashed in its rear, caused the front of it to be bashed in when colliding with the Clark car, caused the Clark car to be bashed in, and then skidded a distance of 147 feet across the highway through an arroyo and up against 10-foot embankment where it came to rest, conclusively demonstrates that the accident was due to the sole, gross and wanton negligence of counterclaimants, as defined in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 106; 166 P. 3d 816; Butane Corporation vs. Kirby, 66 Ariz. 272, 187 P. 2d, 325."

In the case of *Spang* vs. *Cote,* 144 Me. 338, 68 Atl. (2d) 823, a car struck an unlighted load of hay stopped on the highway directly ahead. The car knocked the hay trailer and tractor weighing 5 or 6 tons, more than 10 feet, and also demolished the plaintiff's automobile. The Maine Court found the facts clearly showed that plaintiff's testimony to the effect he was driving 25 to 30 miles per hour, was erroneous, and held that

the plaintiff was bound to use his eyes and bound to seasonably see that which was open and apparent.

In the case of *Dietz* vs. *Morris*, 98 Atl (2d) 537, the Maine Court had before it a situation where a truck was left upon the highway without lights. It was a clear night and an approaching car rounded a curve at 40 to 45 miles per hour. The truck was at that point 270 feet ahead of the car on a straight-of-way. The driver of the approaching car did not see the parked truck until 30 to 40 feet distant. He then jammed on his brakes and swerved, but was too late to avoid a collision. In speaking of the driver of the approaching car, the Court said:

> "There is no doubt that he either did not see what was plainly visible right in front of him, or that he rushed into a place where his vision was obscured so that he could not stop within the distance that was illumined by his own headlights." and "In either case, he was contributorily negligent as a matter of law and his recovery is barred."

The Court went on to hold that a verdict for the defendant truck driver was properly directed.

The facts in the case before this Court are even stronger. Defendant J. W. NATION was making a proper use of the highway in his operation of the tow truck. Although not controlled by statute, his use of the highway was in compliance with any requirement that could possibly be pertinent. He had complied with the common law duty to exercise due care and warn others on the highway of the presence of the tow truck and the semi. The driver of the Buick had ignored the fusees that had been placed in such locations as to give approaching motorists the greatest advance warnings (T 66, 81-82, 85, 90-91). The driver of the Buick had also ignored the warning of the red reflectors which were located on the highway near the fusees (T 92, 137). The driver of the Buick either failed to see or ignored the stopped equipment which was brilliantly lighted (T 84-85, 96,-97, 100-101, 134-135). The driver of the Buick ignored the warning given by Defendant J. W.

NATION blinking his headlights from parking to driving beam (T 102). The driver of the Buick continued his excessive speed, giving no heed to these multiple warnings of danger (T 63, 101-102). That speed and the failure to heed the warnings, were the proximate cause of the collision.

Upon these facts we submit that reasonable men could not differ in their conclusion, and that such conclusion must necessarily be that, regardless of the question of whether or not Defendant J. W. NATION was negligent, the driver of the Buick automobile was, as a matter of law, negligent, and that such negligence was gross and wanton negligence.

## IV.

This Argument is urged in support of Specifications of Error Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

This Argument is necessarily based on the assumption that GENERAL GRANT GREER, JR., was driving the Buick and that he was negligent.

The question of whether the negligence of one spouse should be imputed to the other due to the fact that recovery would be an asset of the community is not here involved, nor is the question of the husband having control of the automobile which is community property, here involved.

GENERAL GRANT GREER, JR., and RUBBY GREER, were traveling in a Buick car owned by the United Church of God in Christ. The record does not disclose whether one or both arranged to, and borrowed the car. It does not disclose the purpose of their venture, or whether both shared the driving responsibilities. The Restatement of the Law on Torts, Negligence, Section 491, page 1273, sets forth the rule on joint enterprise:

"Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the

contributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to third persons injured by the negligence of a fellow member."

"Comment f. The fact that the driver and another riding with him are in joint possession of the vehicle is sufficient to make any journey taken by them therein a joint enterprise irrespective of whether the journey is or is not made for a common business purpose. This is so not only when the joint possession arises from a joint hiring, but also when it results from a joint ownership."

Applying this rule to the facts present, the undertaking was a joint enterprise and each of the GREERS had equal interests and rights in the conduct of the trip and in the control of the automobile.

It is the general rule that the negligence of the driver is imputable to a passenger where both are engaged in a joint enterprise.

*ROCCA* vs. *TILLIA* (Pa.)
162 Atl. 495.

*GREENWELL'S ADMINISTRATOR* vs. *BURBA*
298 Ky. 255; 182 SW (2d) 436.

In the case of *Greenwell's Administrator* vs. *Burba*, several boys agreed that one of their number would borrow a car and all would share in the expenses of the trip to a nearby town to a dance. On their return they were traveling down a hill at an excessive speed when they came upon a truck parked partially upon the boys' side of the highway. To avoid the truck, the boys went off the road and drove between the truck and a rock pile. They first left the road when 150 feet away, and then traveled 300 feet upon the shoulder, upsetting the car and causing the boys' deaths. This constituted a joint enterprise with a joint right and privilege of directing the movement and management of the car, and upon that theory the Court imputed the negligence of the driver to the passengers.

Since the GREERS were engaged in a joint venture, the negligence of GENERAL GRANT GREER, JR., would be imputed to RUBBY GREER.

Even as an ordinary passenger in the Buick automobile, there were certain duties incumbent upon RUBBY GREER. In *Benton* vs. *Thompson* (Mo.) 156 SW (2d) 739, the Court found that a passenger plaintiff must exercise ordinary care for her own safety. They approved an instruction to the effect that if the jury found that the deceased passenger "in the exercise of ordinary care for her own safety could have observed and seen the approach of the train in time thereafter to have warned the driver of the automobile of the approach of said train, and in time for the driver to have so handled the automobile as to have prevented the collision", the plaintiff would not be entitled to recover.

In *Friedman* vs. *Friedman,* 40 Ariz. 96; 9 P. (2d) 1015, plaintiff rode from Yuma, Arizona, to Calexico in defendant's automobile. Three times during the trip defendant drove at excessive speeds and on protests, slowed down. On the return trip, the driver had promised to drive more slowly but shortly after leaving, operated the car at high speed despite protests. The car burst into flame, went out of control and turned over, injuring plaintiff. The Court there held that it was the duty of plaintiff to leave the car before the accident occurred, or to place some other driver in charge, and that they were at fault in being in the car at the time it overturned.

In *Franco* vs. *Vakares,* 35 Ariz. 309; 277 P. 812, plaintiff accepted a ride with defendant and spent several hours drinking and joy riding around Tucson, Arizona. The inevitable accident occurred. The Court there linked the situation to a joint venture, saying that the common will of joint venturers usually controlled and directed their movements, and that the plaintiff knew or should have known that the defendant was unfit to drive the car and that his driving would endanger the lives of

others, but despite this fact plaintiff voluntarily rode with defendant.

RUBBY GREER was a passenger in the Buick automobile. She would have a duty not only to require that the car be driven at a slower speed, but also to warn the driver of the car of the apparent danger ahead. The speed of between 70 and 100 miles per hour at night in the area of the accident was so excessive as to require any person riding as a passenger in a car at such speed, to take steps necessary to have the driver reduce its speed or for such passenger to leave the car in the interests of that passenger's own safety.

The red fusee was visible to RUBBY GREER as a passenger in the car when that car was ¾ of a mile distant from the fusee (T 85). At the same point, the many lights on the tow truck and semi were also visible to her (T 83-85). These fusees and lights could mean only danger. At that point, RUBBY GREER, in the exercise of ordinary care for her own safety, could have observed and seen the warnings in sufficient time to have warned the driver of the Buick automobile, and in time so that the driver could have handled the automobile in such a manner as to have prevented the collision. It is apparent that she did not do so, and the Estate of RUBBY GREER is not entitled to recover from defendants or either of them.

## CONCLUSION

Defendants sincerely submit that all, and the only, evidence introduced establishes (1) no negligence on the part of Defendant J. W. NATION and consequently no negligence on the part of Defendant GRIFFEN BUICK, INC., and (2) sole, and wilful and wanton negligence upon the part of the driver of the Buick in which the GREERS were riding. Under the circumstances present GENERAL GRANT GREER, JR. was, as a matter of law, guilty of at least contributory negligence, and that negligence was so gross, wilful and wanton as to require its imputation to RUBBY GREER.

Defendants respectfully submit that under every possible view of the evidence and law, the Findings of Fact and Conclusions of Law and Judgements were erroneous.

Defendants respectfully ask that Judgment in each of these causes be reversed and that each of these causes be remanded with directions to enter Judgments for the Defendants and each of them in each cause.

Respectfully submitted,

GUST, ROSENFELD, DIVELBESS & ROBINETTE
By: James F. Henderson
Attorneys for Appellants

## APPENDIX

66-157a. Special restrictions.—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(b) Where no special hazard exists that requires lower speed for compliance with paragraph (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Fifteen (15) miles per hour approaching school crossing;
2. Twenty-five (25) miles per hour in any business or residence district;
3. (a) Fifty (50) miles per hour in other locations during daytime except state highways;

   (b) Reasonable and prudent miles per hour during the daytime on state highways;
4. (a) Forty-five (45) miles per hour during the nighttime in other locations except state highways;

   (b) Fifty (50) miles per hour during the nighttime on state highways.

Daytime means from a half hour before sunrise to a half hour after sunset. Nighttime means at any other hour.

The prima facie speed limits set forth in this section may be altered as authorized in Sections 57 and 58 (Sections 66-158, 66-159).

(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions. (Laws 1950 (1st S.S.) ch. 3, Sec. 56).

66-171. Stopping, standing, or parking outside of business or residence district.

(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of 200 feet in each direction upon such highway.

(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position. (Laws 1950 (1st S.S.) ch. 3, Sec. 107).

66-182a. Display of warning devices when vehicle disabled.

(a) Whenever any motor truck, passenger bus, truck, tractor, trailer, semi-trailer, or pole trailer is disabled upon the

traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway except as provided in paragraph (b);

1. A lighted fusee shall be immediately placed on the roadway at the traffic side of the motor vehicle unless electric lanterns are displayed.

2. Within the burning period of the fusee and as promptly as possible three (3) ligthed flares (pot torches) or three (3) electric lanterns shall be placed on the roadway as follows:

   One (1) at a distance of approximately 100 feet in advance of the vehicle, one (1) at a distance of approximately 100 feet to the rear of the vehicle, each in the center of the lane of traffic occupied by the disabled vehicle, and one (1) at the traffic side of the vehicle approximately 10 feet rearward or forward thereof.

(b) Whenever any vehicle used in the transportation of flammable liquids in bulk, or transporting compressed flammable gases is disabled upon a highway at any time or place mentioned in paragraph (a) of this section, the driver of such vehicle shall display upon the roadway the following lighted warning devices: One (1) red electric lantern shall be immediately placed on the roadway at the traffic side of the vehicle and two (2) other red electric lanterns shall be placed to the front and rear of the vehicle in the same manner prescribed in paragraph (a) above for flares.

When a vehicle of a type specified in paragraph (b) is disabled the use of flares, fusees, or any signal produced by flame as warning signals is prohibited.

(c) Whenever any vehicle of a type referred to in this section is disabled upon the traveled portion of a highway or the shoulder thereof outside of any municipality at any time when the display of fusees, flares, or electric lanterns is not required, the driver of such vehicle shall display two (2) red flags upon the roadway in the lane of traffic occupied by the disabled vehicle, one (1) at a distance of approximately 100 feet in advance of the vehicle, and one (1) at a distance of approximately 100 feet to the rear of the vehicle.

(d) In the alternative it shall be deemed a compliance with this section in the event three (3) portable reflector units on standards of a type approved by the department are displayed at the times and under the conditions specified in this section either during the daytime or at nighttime and such portable reflector units shall be placed on the roadway in the locations as described with reference to the placing of electric lanterns and lighted flares.

(e) The flares, fusees, lanterns, and flags to be displayed as required in this section shall conform with the requirements of section 151 (Sec. 66-181) applicable thereto. (Laws 1950 (1st S.S.) ch. 3, Sec. 152.)